



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 31, 1998

Ms. Linda Wiegman
Supervising Attorney
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR98-0843

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 113734.

The Texas Department of Health (the "department") received a request for information relating to an incident which occurred at Columbia Bellaire Hospital on July 11, 1995. You claim that the medically related information in the records is excepted from disclosure by section 552.101 of the Government Code in conjunction with common law privacy, as well as section 611.002(a) of the Health and Safety Code and V.T.C.S. article 4495b, section 5.08(b). You also seek to withhold certain information pursuant to the informer's privilege. We have considered the arguments that you raised and have reviewed the documents at issue.

Sections 552.301 and 552.302 require a governmental body to release requested information or to request a decision from the attorney general within ten business days of receiving a request for information the governmental body wishes to withhold. When a governmental body fails to request a decision within ten business days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. *See, e.g.*, Open Records Decision No. 150 (1977) (presumption of openness overcome by showing that information is made confidential by another source of law or affects third party interests).

The department received the request for information on December 17, 1997. You requested a decision from this office on January 9, 1998. Consequently, you failed to request a decision within

the ten business days required by section 552.301(a) of the Government Code. Thus, as you assert that the requested information is made confidential by other laws, we will examine whether the documents at issue are public and must be disclosed.¹

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 611.002(a) of the Health and Safety Code makes communications between a patient and a professional and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional confidential. Section 611.004(d) provides that "[a] person who receives information from confidential communications or records may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the person first obtained the information." We have marked the records that you must withhold under sections 611.002(a) and 611.004 of the Health and Safety Code.

You also claim that some of the records submitted in response to the request are confidential under the Medical Practice Act. Section 5.08 of the Medical Practice Act, V.T.C.S. article 4495b (the "MPA"), provides:

(a) Communications between one licensed to practice medicine, relative to or in connection with any professional services as a physician to a patient, is confidential and privileged and may not be disclosed except as provided in this section.

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

In addition, section 5.08(j)(3) provides for further release of confidential medical records obtained with a valid consent for release only if the disclosure "is consistent with the authorized purposes for which consent to release the information was obtained." *See also* V.T.C.S. art. 4495b, § 5.08(c). We have marked the information that may only be released in accordance with the MPA.

In addition, some of the information consists of the hospital's statements of deficiencies and plans of correction which were prepared for purposes of a Medicare or Medicaid complaint investigation survey. In accordance with federal regulations, you must release these provided that 1) no information identifying individual patients, physicians, other medical practitioners, or other

¹A claim under the informer's privilege may be waived by the governmental body since the privilege belongs to the government. *See* Open Records Decision No. 549 (1990) at 6. We conclude that the informer's privilege is not a compelling exception in this instance and, therefore, may not be used to withhold any of the requested information from required public disclosure under section 552.101.

individuals shall be disclosed, and 2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 (1988). As the reports are signed by a provider representative and the "provider's plan of correction" portions of the reports appear to contain the provider's comments to the reports, we believe the provider has had a reasonable opportunity to review and comment on the reports. Accordingly, you must release these federal reports, but with deletions of information that identify the persons specified in the regulations.

Finally, some of the requested information is protected by a right to privacy. Section 552.101 of the Government Code also encompasses common-law privacy. Common-law privacy excepts from disclosure private facts about an individual. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate or embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

This office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987). After reviewing the submitted information, we believe that some of the information must be withheld by a right of privacy. We have marked the information that must be withheld under section 552.101 in conjunction with a right to privacy.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/ch

Ref: ID# 113734

Enclosures: Marked documents

cc: Mr. George C. Hanks, Jr.
 Wickliff & Hall
 First Interstate Bank Plaza
 1000 Louisiana, Suite 5400
 Houston, Texas 77002-5013
 (w/o enclosures)